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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
RODERICK L. WHEELER Employee)) OEA Matter No.: 1601-0261-95R07R10
v.)
DISTRICT OF COLUMBIA METROPOLITAN DEPARTMENT Agency	Date of Issuance: March 5, 2012)))

SECOND OPINION AND ORDER ON REMAND

Mr. Roderick L. Wheeler ("Employee") worked as a Detective with the Metropolitan Police Department ("Agency"). On April 14, 1994, Employee provided a urine specimen during a routine pre-five year physical examination. According to Agency, the urine sample tested positive for marijuana. As a result, Employee was charged with "the taking of any drug or substance, on or off duty, as described in the D.C. Uniform Controlled Substances Act of 1981, unless taken upon the prescription of a licensed physician or registered practitioner authorized to dispense a controlled substance during the course of professional practice."

Employee denied the charges and appealed his case to a three-member Adverse Action

¹ As provided in Title 1, Section 617.1(d), Numbers (5)(10)(16) of the D.C. Official Code.

Panel ("Trial Board"). The Trial Board conducted a three-day hearing. After considering witness testimony and written reports, the Trial Board concluded that there was substantial evidence that Employee's urine did have the confirmed presence of marijuana. Thus, they recommended that Employee be removed from his position with Agency.²

On September 15, 1995, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). Initially, the OEA Administrative Judge ("AJ") conducted a *de novo* hearing and issued an Initial Decision on June 17, 1998, reversing Agency's removal action against Employee. That decision was upheld by the OEA Board on March 23, 2000. However, on January 16, 2007, the Superior Court of the District of Columbia reversed the Initial Decision and remanded the case to OEA for further findings. Specifically, the Court held that the *de novo* hearing should not have been conducted and ordered the AJ to base his findings solely on the record established at the Trial Board hearing.³

In light of the Court's order, the AJ reconvened the parties to determine whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural

² Petition for Appeal, Attachment p. 11-17 (September 15, 1995).

³The Court relied on *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2000) which provided that an administrative judge is bound by the record established at the agency level and may not conduct a *de novo* hearing in the event an employee files an appeal with this Office. The following conditions must be present to invoke the *Pinkard* standard:

^{1.} The employee is an employee of either the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;

^{2.} The employee has been subjected to an adverse action;

^{3.} The employee is a member of a bargaining unit covered by a collective bargaining agreement;

^{4.} The collective bargaining agreement provides that when an employee has been granted a departmental hearing and subsequently files an appeal with this Office, any further appeal shall be based solely on the record established in the departmental hearing; and

^{5.} At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an employee's removal.

error; and whether Employee's removal was conducted in accordance with applicable laws and regulations. He outlined the relevant information that was captured during the Trial Board hearing for each witness, as well as the documents on which the Trial Board relied.⁴

Ultimately, the AJ held that the Trial Board's findings were based on substantial evidence.⁵ He relied on *Ford v. U.S.* 396 A.2d 191 (D.C. 1978) which provided that the government has the benefit of a presumption, in the absence of evidence tampering, that when physical evidence is in the hands of the government, it has been handled properly. The Court in *Ford* also reasoned that it is presumed that when government officials are charged with keeping evidence, they have properly discharged their duties.⁶

The AJ provided that in the current matter, one of Agency witnesses testified that the room was properly secured which prevented evidence tampering. Agency established that it followed its standard operating procedures. Employee initialed the drug test record urine slips; he placed his thumb print on the forms; he provided the urine sample and split the sample into

⁴ The AJ clarified the arguments made by the parties on appeal. Employee believed that the Trial Board's findings were not based on substantial evidence or in accordance with the law. He reasoned that the chain of custody for his urine sample was broken because the drug testing officer was unable to determine the location of his sample. He also asserted that the collecting officer's failure to adhere to Agency's urine collection procedures, constituted a fatal chain in custody. Finally, Employee alleged that Agency's urine collection procedures were unsound and invited confusion to the process of collecting the urine samples.

Conversely, Agency argued that its decision was based on substantial evidence because it followed its routine collection procedures which resulted in an intact chain of custody. It insisted that Employee failed to rebut the presumption that it handled the evidence properly. Lastly, Agency declared that the Trial Board acted within its discretion to reject Employee's expert witness' testimony regarding problems with the collection procedures. *Initial Decision*, p. 5-16 (October 22, 2010).

⁵ Agency considered the following factors before making its recommendation to terminate Employee: (1) Employee was a sworn officer of Agency and charged with the responsibility to enforce the laws of the District of Columbia, and as such, is always on duty; (2) the taking of controlled substances is a crime and in direct conflict with Agency's written policies and guidelines, as well as Employee's oath of office; (3) the professional integrity of Employee, who was bound to enforce the laws relating to controlled substances, was compromised with the public, his peers, and in the legal community, as a result of the Trial Board's determinations; and (4) the use of marijuana by any member of Agency's force not only breaches the regulations, but it adversely affects and compromises Agency's integrity.

⁶ Initial Decision, p. 17 (October 22, 2010).

two separate containers; he sealed both bottles; and he attached his thumbprint to the bottles sealed with tamper proof evidence tape. Therefore, Agency proved that Employee's sample was distinguishable from other urine samples and was indeed Employee's.⁷

After considering the record as a whole, the AJ found no evidence that the Trial Board committed any procedural error that would justify reversing or modifying its recommendation to terminate Employee. It adhered to all applicable laws, rules, and regulations when reaching its conclusion. The penalty of removal was within the range allowed by law and great consideration was given to the relevant factors in the case. Accordingly, the AJ upheld Agency's action to remove Employee.⁸

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA Board on November 24, 2010. He argued that the AJ's findings were based solely on an unreliable drug test and failed to address Employee's primary assertion that the positive specimen was not his urine sample. Employee insisted that it was not his intent to show that the sample was tampered with but that it was not his sample. It was Employee's position that each link in the chain of custody of a drug screening must be proven for the urine sample to be admissible. As a result, Employee requested that the Board reverse the AJ's findings.⁹

On January 14, 2011, Agency filed its opposition to Employee's Petition for Review. It argued that the Employee's denial that the sample was his lacked merit. Agency reasoned that the Trial Board's decision should be upheld because there was substantial evidence to support its findings that the chain of custody of Employee's urine sample was intact. As proof that the

⁸ *Id.* at 21.

⁷ *Id.*, 17-18.

⁹ Petition for Review (November 24, 2010).

sample was intact, Agency provided documents that were signed and initialed by Employee for each split specimen. As for Officer Jones' recollection of collecting Employee's sample, Agency provided that Jones testified that the sample was taken as part of the regular course of business, and he followed the usual and customary procedures. Thus, the chain of custody forms are admissible as records of regularly conducted activities. Accordingly, Jones' personal recollection is not required for the admission of these forms as evidence that the chain of custody was not broken.

Agency went on to provide that because Employee signed and initialed the documents containing his thumbprint, then it logically flows that it is his thumbprint that was affixed to the seal containing his signature. As for Employee's arguments regarding Officer Jones leaving the collection room, Agency asserted that Jones testified that he locked both locks when he left the room or gave the keys to the firefighter who was in charge of collecting samples for that agency. Agency also responded to Employee's argument about the exact location of his urine sample on the tray of samples collected. It reasoned that the position of the sample on the tray would not impact the chain of custody. Further, it contended that even if there was an error made by Agency, the specimen was also tested by an independent laboratory and yielded the same positive results.

Standard of Review

The current case is on point with a matter recently decided by the Superior Court for the District of Columbia. In *Metropolitan Police Department v. District Office of Employee Appeals and Robert Cooper*, No. 2008 CA 008607 (D.C. Super. Ct. February 7, 2012), Mr. Cooper

¹⁰ There was only one set of keys which required Agency and the firefighter to share the keys.

¹¹ Agency's Opposition to Employee's Petition for Review (January 14, 2011).

participated in a mandatory physical examination that required him to provide a urine sample. The sample tested positive for marijuana, and he was subsequently terminated from the Metropolitan Police Department. Similar to the current matter, Mr. Cooper questioned irregularities in the sample's chain of custody. The Court in *Cooper* held that OEA's standard of review of the Trial Board's ruling was restricted to determining whether its findings regarding the chain of custody of the urine sample was supported by substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹²

Chain of Custody

Employee specifically argued that AJ's findings were based solely on an unreliable drug test and failed to address Employee's primary assertion that the positive specimen was not his urine sample. However, he failed to provide any factual support for that proposition. Employee also incorrectly relies on *Novak v. District of Columbia*, 82 U.S. App. D.C. 95 (1947) in his belief that each link in the chain of custody of a drug screening must be proven for the evidence to be admissible. ¹³

Courts have retreated from *Novak* which required an unbroken chain of custody as a prerequisite to admissibility. The Court in *In re D.S.*, 747 A.2d 1182 (D.C. 2000) found that a chain of custody for real evidence must be established if: (1) the item is not readily identifiable;

¹² Black's Law Dictionary, Eighth Edition; Mills v. District of Columbia Department of Employment Services, 838 A.2d 325 (D.C. 2003); and Black v. District of Columbia Department of Employment Services, 801 A.2d 983 (D.C. 2002).

¹³ As previously noted, Employee took issue with the fact that one of Agency witnesses testified that he did not know the exact location of Employee's urine sample on the tray of samples collected. Finally, Employee presented that Agency failed to adhere to its policy of collecting samples because one witness testified that only lower level members are required to provide a split sample while another witness provided that all members should have provided split samples.

(2) the item is readily identifiable but the witness neglected to note the characteristics that make the item readily identifiable; or (3) the item is susceptible to alteration by tampering or contamination. The Court of Appeals went on to hold in *Fleming v. United States*, 923 A.2d 830 (D.C. 2007) that even if a break in the chain of custody is established, such break would only affect the weight to be given to the evidence, not the admissibility of the evidence. Therefore, even if all of Employee's allegations are true about the collection irregularities, they must be weighed against the evidence presented by Agency. Also, OEA's review of the evidence in this case is guided by the Court's ruling that where an agency's finding is supported by substantial evidence, OEA must accept those findings even though the record could support a contrary finding. ¹⁵

The record is replete with evidence that Employee's urine sample was readily identifiable. Employee initialed the drug test record urine slips; he placed his thumb print on the forms; he provided the urine sample and split the sample into two separate containers; he sealed both bottles; and he attached his thumbprint to the bottles sealed with tamper proof evidence tape. The Court in *Turney v. United States*, 626 A.2d 872 (D.C. 1993), reasoned that one way that chain of custody can be shown is by having the police officer initial the evidence. Similarly, the Court of Appeals held in *Tompkins v. United States*, 272 A.2d 100 (D.C.1970) that the

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¹⁴ Likewise, the District of Columbia Circuit Court provided in *United States v. Mejia*, 389 U.S. App. D.C. 340 (2010) that a challenge to the chain in custody goes to weight rather than admissibility.

¹⁵ Brown v. Watts, 993 A.2d 529 (D.C. 2010).

¹⁶ Agency presented exhibits of two separate narcotic/drug test record sheets that were initialed by Employee. One sheet had the control number of 941903 and the other listed 941904. Agency also provided the maintenance checklist of activities for the collections. Additionally, the chain of custody forms and urinalysis reports were provided for sample 941904 which was sent to Roche/Compuchem Laboratories, an independent lab that verified the positive results. A urinalysis report was also provided for sample 941903 which was sent to American Medical Laboratories, Inc.; this laboratory also confirmed Agency's positive test results. Finally, Agency provided a chain of custody document which provided a finger print on a tag labeled 941904. Agency witness, Steve Van Nus, testified that this document was attached to the urine sample sent to Roche/Compuchem Laboratories. See *Agency Response to Employee's Appeal*, Exhibit D (January 26, 1996).

government presented sufficient evidence to establish the chain of custody when it used its signature-initial identification procedure that it routinely followed. As Agency provided in its Opposition to Employee's Petition for Review, Employee signed and initialed the documents corresponding to his sample which contained control numbers for the purposes of identification.¹⁷

Additionally, Agency offered witnesses who noted the characteristics that made the sample identifiable. Officers Jones and Butler testified that Employee's urine collection was performed during the regular course of business and that they followed Agency's usual and customary procedures during the collection and testing. 18 Thus, the chain of custody forms are admissible as records of regularly conducted activities. As Agency suggested, Jones' personal recollection is not required for the admission of these forms as evidence that the chain of custody was not broken. Hence, there is no link missing in the chain of custody. Employee never presented evidence to suggest that the signature or initials were not his. Accordingly, the urine sample was readily identifiable by very specific characterizations.

Evidence of Tampering

Employee failed to prove that there was any evidence of tampering or contamination. The Court of Appeals in Ford v. United States, 396 A.2d 191 (D.C.1978) held that when physical evidence is in control of government, the presumption arises that it has been handled properly. It went on to provide in Rosser v. United States, 313 A.2d 876 (D.C.1974) that when the government has established an unbroken chain of custody as a matter of reasonable probability, the opposing party must present evidence of tampering. Once the government has

 $^{^{17}}$ Agency's Opposition to Employee's Petition for Review, p. 5-6 (January 14, 2011). 18 Id. at 6.

shown that it preserved the evidence at issue according to standard procedure, it is up to the defendant to introduce evidence that the routine handling of the evidence by the government did not suitably preserve it.¹⁹ Therefore, the burden is on Employee to rebut the presumption that the government had established an unbroken chain of custody. By showing that the sample had been tampered with or was indistinguishable from other samples handled by Agency on the same day, Employee could have established a defect in a link in the chain. However, Employee did not offer any such evidence.

Credibility Determinations

Employee made a myriad of statements regarding the collection procedure. These statements were not corroborated.²⁰ However, they were rebutted by several Agency witnesses. Employee's case in chief consisted of testimony from an expert witness and a claim that he did not submit a split sample, despite his signature on two separate narcotic/drug test record sheets. Thus, Employee is requesting this Board to reverse Agency's action against him on the basis of witness credibility.

OEA has held that it will not question credibility determinations made by the fact finder,

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¹⁹ See *German v. United States*, 525 A.2d 596 (D.C 1987).

²⁰ In an effort to rebut the presumption that the chain of custody was intact, Employee offered that (1) Officer Joseph Jones testified that he had no recollection or personal knowledge of his urine sample; (2) Officer Jones left the collection room and samples periodically; (3) Officer Jones testified that he usually locks the door of the collection room, but on this day, he did not; (4) Officer Jones testified that there were an unknown number of people coming into the collection room to give samples while he was away; (5) Employee's urine specimen paperwork was misplaced and switched with an unknown person; (6) Employee did not give a split sample and has no knowledge of how one was attributed to him; (7) Agency provided no evidence to prove that the thumb print attached to the split urine specimen belonged to Employee; and (8) Employee paid for an independent drug screening when he learned about the positive results. He also took issue with the fact that one of Agency witnesses testified that they did not know the exact location of Employee's urine sample on the tray of samples collected. Finally, Employee presented that Agency failed to adhere to its policy of collecting samples because one witness testified that only lower level members are required to provide a split sample while another witness provided that all members should have provided split samples.

which is the Trial Board in this case.²¹ The Court in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. Thus, this Board will not second guess the Trial Board credibility determinations. After review of the Trial Board hearing transcript, a reasonable mind would accept Agency's witnesses as credible and adequate to support its decision to remove Employee.

Conclusion

Having considered all of the relevant evidence relating to the chain of custody, this Board is convinced that the urine sample did belong to Employee. The Trial Board properly weighed the evidence and made credibility determinations that will not be disturbed because they were based on substantial evidence. Accordingly, we must DENY Employee's Petition for Review.

²¹ Ernest H. Taylor v. D.C. Fire and Emergency Medical Services, OEA Matter No. 1601-0101-02, Opinions and Orders on Petition for Review (July 31, 2007); Larry L. Corbett v. D.C. Department of Corrections, OEA Matter No. 1601-0211-98, Opinion and Order on Petition for Review (September 5, 2007); and Paul D. Holmes v. D.C. Metropolitan Police Department, OEA Matter No. 1601-0014-07, Opinion and Order on Petition for Review (November 23, 2009).

ORDER

Accordingly, it is hereby ORDERED	that Employee's Petition for Review	is
DENIED.		

FOR THE BOARD:	
	Clarence Labor, Chair
	Barbara D. Morgan

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.

Richard F. Johns